

## CHAPTER 6 UNIFORM WAIVER AND VARIANCE RULES

**493—6.1(13B,17A) Applicability.** This chapter outlines a uniform process for the granting of waivers or variances from rules adopted by the state public defender. The intent of this chapter is to allow persons to seek exceptions to the application of rules issued by the state public defender.

**493—6.2(13B,17A) Interpretive rules.** This chapter shall not apply to rules that merely define the meaning of a statute or other provision of law or precedent if the state public defender does not possess delegated authority to bind the courts to any extent with its definition.

**493—6.3(13B,17A) Compliance with statute.** The state public defender shall not grant a petition for waiver or variance from a rule unless a statute or other provision of law has delegated authority to the state public defender sufficient to justify that action and the waiver or variance is consistent with the statute or other provision of law. No waiver or variance may be granted from a requirement that is imposed by statute, unless the statute itself specifically authorizes that action. Any waiver or variance must be consistent with statute.

**493—6.4(13B,17A) Criteria for waiver or variance.** At the sole discretion of the state public defender, the state public defender may issue an order, in response to a completed petition or on the state public defender's own motion, granting a waiver or variance from a rule adopted by the state public defender, in whole or in part, as applied to the circumstances of a specified person or a specific and narrowly drawn class of persons if the state public defender finds based on clear and convincing evidence that:

1. The application of the rule to the petitioner would pose an undue hardship on the person or class of persons for whom the waiver or variance is requested;
2. The waiver or variance from the requirements of a rule in the specific case would not prejudice the substantial legal rights of any person;
3. The provisions of a rule subject to a petition for a waiver or variance are not specifically mandated by statute or another provision of law; and
4. Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver or variance is requested.

**493—6.5(13B,17A) Filing of petition.** A petition for a waiver or variance must be submitted in writing to the State Public Defender, Lucas State Office Building, 321 East 12th Street, Des Moines, Iowa 50319-0087. If the petition relates to a pending contested case, the petition shall also be filed in the contested case proceeding.

**493—6.6(13B,17A) Content of petition.** A petition for waiver or variance shall include the following information where applicable and known to the requester:

1. The name, address, and telephone number of the entity or person for whom a waiver or variance is being requested and the case number of any related contested case.
2. A description and citation of the specific rule from which a waiver or variance is requested.
3. The specific waiver or variance requested, including the precise scope and operative period that the waiver or variance will extend.
4. The relevant facts that the petitioner believes would justify a waiver or variance. This statement shall include a signed statement from the petitioner attesting to the accuracy of the facts provided in the petition and a statement of reasons that the petitioner believes will justify a waiver or variance.

5. A history of any prior contacts between the state public defender and the petitioner relating to the regulated activity, representation or other assigned function of the state public defender that would be affected by the proposed waiver or variance, including a description of each regulated activity, representation or other assigned function of the state public defender, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, representation or other assigned function of the state public defender within the last five years.

6. Any information known to the requester regarding the state public defender's treatment of similar cases.

7. The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question or which might be affected by the granting of a waiver or variance.

8. The name, address, and telephone number of any person or entity that would be adversely affected by the granting of a petition.

9. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver or variance.

10. Signed releases of information authorizing persons with knowledge regarding the request to furnish the state public defender with information relevant to the waiver or variance.

**493—6.7(13B,17A) Additional information.** Prior to issuing an order granting or denying a waiver or variance, the state public defender may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the state public defender may, on its own motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and the state public defender or state public defender's designee.

**493—6.8(13B,17A) Notice.** The state public defender shall acknowledge a petition upon receipt. The state public defender shall ensure that, within 30 days of the receipt of the petition, notice of the pendency of the petition and a concise summary of its contents have been provided to all persons to whom notice is required by any provision of law. In addition, the state public defender may give notice to other persons. To accomplish this notice provision, the state public defender may require the petitioner to serve the notice on all persons to whom notice is required by any provision of law and provide a written statement to the state public defender attesting that notice has been provided.

**493—6.9(13B,17A) Hearing procedures.** The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply to any petition for a waiver or variance of a rule filed within a contested case and shall otherwise apply to agency proceedings for a waiver or variance only when the state public defender so provides by rule or order or is required to do so by statute.

**493—6.10(13B,17A) Ruling.** An order granting or denying a waiver or variance shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and operative period of the waiver if one is issued.

**6.10(1) State public defender discretion.** The decision on whether the circumstances justify the granting of a waiver or variance shall be made at the discretion of the state public defender upon consideration of all relevant factors.

**6.10(2) Burden of persuasion.** The petitioner has the burden of persuasion when a petition is filed for a waiver or variance from a state public defender rule. The standard of proof is clear and convincing evidence.

**6.10(3) *Special waiver or variance rules not precluded.*** This chapter shall not preclude the state public defender from granting waivers or variances in other contexts or on the basis of other standards if a statute authorizes the state public defender to do so and the state public defender deems it appropriate to do so.

**6.10(4) *Administrative deadlines.*** When the rule from which a waiver or variance is sought establishes administrative deadlines, the state public defender shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all persons similarly situated.

**6.10(5) *Conditions.*** The state public defender may condition the granting of the waiver or variance on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question through alternative means and in compliance with the following provisions:

*a.* Each petition for a waiver or variance shall be evaluated by the state public defender based on the unique, individual circumstances set out in the petition;

*b.* A waiver or variance, if granted, shall be drafted by the state public defender so as to provide the narrowest exception possible to the provisions of the rule;

*c.* The state public defender may place on a waiver or variance a condition that the state public defender finds desirable to protect the public health, safety, and welfare;

*d.* A waiver or variance shall not be permanent, unless the petitioner can show that a temporary waiver or variance would be impracticable; and

*e.* If a temporary waiver or variance is granted, there is no automatic right to renewal. At the sole discretion of the state public defender, a waiver or variance may be renewed if the state public defender finds that all of the factors set out in rule 6.4(13B,17A) remain valid.

**6.10(6) *Time for ruling.*** The state public defender shall grant or deny a petition for a waiver or variance as soon as practicable but, in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, the state public defender has the discretion to wait until the contested case is resolved before entering an order on the petition for waiver or variance.

**6.10(7) *When deemed denied.*** Failure of the state public defender to grant or deny a petition within the required time period shall be deemed a denial of that petition by the state public defender.

**6.10(8) *Service of order.*** Within seven days of its issuance, any order issued under this chapter shall be transmitted to the petitioner or the person to whom the order pertains and to any other person entitled to such notice by any provision of law.

**493—6.11(13B,17A) *Public availability.*** Subject to the provisions of Iowa Code section 17A.3(1)“e,” the state public defender shall maintain a record of all orders granting or denying waivers and variances under this chapter. All final rulings in response to requests for waivers or variances shall be indexed and available to members of the public at the state public defender’s office.

Twice each year the state public defender must prepare a report that:

1. Identifies the rules for which a waiver or variance has been granted or denied;
2. Identifies the number of times a waiver or variance was granted or denied for each rule;
3. Includes a citation to the statutory provisions implemented by these rules; and
4. Includes a general summary of the reasons justifying the state public defender’s actions.

**493—6.12(13B,17A) *Voiding or cancellation.*** A waiver or variance is void if the material facts upon which the request is based are not true or if material facts have been withheld. The state public defender may at any time cancel a waiver or variance upon appropriate notice and hearing if the state public defender finds that the facts as stated in the request are not true, material facts have been withheld, the alternative means of compliance provided in the waiver or variance have failed to achieve the objectives of the statute, or the requester has failed to comply with the conditions of the order.

**493—6.13(13B,17A) Violations.** Violation of conditions in the waiver or variance approval is the equivalent of violation of the particular rule for which the waiver or variance is granted and is subject to the same remedies or penalties.

**493—6.14(13B,17A) Defense.** After the state public defender issues an order granting a waiver or variance, the order is a defense within its terms and the specific facts indicated therein for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

**493—6.15(13B,17A) Appeals.** Any request for an appeal from a decision granting or denying a waiver or variance shall be in accordance with the procedures provided in Iowa Code chapter 17A and state public defender rules. An appeal shall be taken within 30 days of the issuance of the ruling in response to the request unless a contrary time is provided by rule or statute.

**493—6.16(13B,17A) Sample petition for waiver or variance.**

BEFORE THE STATE PUBLIC DEFENDER	
Petition by (insert name of petitioner) for the waiver of (insert rule citation) relating to (insert the subject matter).	No. _____  PETITION FOR WAIVER

- Include the following information in the petition for waiver where applicable and known:
1. Provide the petitioner’s (the person who is asking for the waiver or variance) name, address and telephone number.
  2. Describe and cite the specific rule from which a waiver or variance is requested.
  3. Describe the specific waiver or variance requested; include the exact scope and time period that the waiver or variance will extend.
  4. Explain the important facts that the petitioner believes justify the waiver or variance. Include in your explanation (a) why application of the rule would pose an undue hardship to the petitioner; (b) why granting the waiver or variance would not prejudice the substantial legal rights of any person; (c) state whether the provisions of a rule subject to this petition are specifically mandated by statute or another provision of law; and (d) state whether public health, safety or welfare will be affected if the requested waiver or variance is granted.
  5. Provide history of prior contacts between the state public defender and the petitioner relating to the regulated activity, license, audit, investigation, inspection or representation that would be affected by the waiver or variance. In that history, include a description of each affected regulated activity, license, appeal, hearing, audit, investigation, inspection, representation or other assigned function of the state public defender, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, license, appeal, hearing, audit, investigation, inspection, representation or other assigned function of the state public defender within the last five years.
  6. Provide information known to the petitioner regarding the state public defender’s treatment of similar cases.
  7. Provide the name, address and telephone number of any public agency or political subdivision which also regulates the activity in question or which might be affected by the granting of a waiver or variance.
  8. Provide the name, address and telephone number of any person or entity that would be adversely affected or disadvantaged by the granting of the waiver or variance.

9. Provide signed releases of information authorizing persons with knowledge regarding the request to furnish the state public defender with information relevant to the waiver or variance.

I hereby attest to the accuracy and truthfulness of the above information.

\_\_\_\_\_  
Petitioner's signature

\_\_\_\_\_  
Date

These rules are intended to implement Iowa Code section 17A.9A.

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